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90-1252

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

MARIO CARBALLO,
PETITIONER,

v.

UNITED STATES OF AMERICA
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

I.

WHETHER AN APPELLATE COURT CAN FIND ERRORS TO BE HARMLESS WITHOUT CONSIDERING THE STRENGTH OF THE GOVERNMENT'S CASE AND THE PROBABLE EFFECT OF THE ERRORS ON THE JURY'S DELIBERATIONS

II.

WHETHER CONSTITUTIONAL ERROR CAN EVER BE DEEMED HARMLESS WHERE THE JURY DEADLOCKED DURING ITS DELIBERATIONS

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Mario Carballo, and the Respondent, United States of America.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

MARIO CARBALLO,

PETITIONER,

v.

UNITED STATES OF AMERICA
RESPONDENT.

The Petitioner Mario Carballo respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in United States v. De La Vega, 913 F.2d 861 (11th Cir. 1990).

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported as United States v. De La Vega, 913 F.2d 861 (11th Cir. 1990) and is reprinted in the appendix hereto (App., infra, A-1 to A-45).

The decision of the Eleventh Circuit denying rehearing and rehearing en banc is reproduced in the appendix hereto (App., infra, A-46).

JURISDICTION

On October 2, 1990, the Eleventh Circuit Court of Appeals affirmed the decision of the district court. A petition for rehearing with a suggestion for rehearing en banc was timely filed. Rehearing was denied on December 4, 1990.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1). Carroll v. United States, 354 U.S. 394 (1957).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fifth Amendment to the Constution of the United States states in pertiment part:

> No person shall be... deprived of life, liberty, or property, without due process of law...

Rule 52(a) of the Federal Rules of Criminal Procedure reads as follows:

> **(a) Harmless Error.** Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

STATEMENT OF THE CASE

1. Course of Proceedings and Disposition in Court Below.

Following a jury trial before the District Court for the Southern District of Florida, Mario Carballo, was found guilty of conspiracy to engage in racketeering activity, in violation of 18 U.S.C. §1962(d) and §1963 (Count 1); racketeering, in violation of 18 U.S.C. §1962(c) and §1963 (Count 2); conspiracy to possess with the intent to distribute 5,000 pounds of marijuana, in violation of 21 U.S.C. §846 (Count 21); conspiracy to possess with the intent to distribute 400 kilograms of cocaine, in violation of 21 U.S.C. §846 (Count 22); and, possession with the intent to distribute cocaine, in violation of 21 U.S.C. §841(a)(1)(Count 23). Carballo was sentenced to fifteen years in prison for

each count, sentences to run concurrently (R12 - 2277).[1]

2. Statement of Facts.

On July 29, 1985, three bodies were found floating in the Miami River. During the course of the investigation into the drowning of these persons, the authorities learned that they had been guarding a load of cocaine stashed at the Jones Boat Yard and had jumped into the water when they were surprised by uniformed police officers. Two drug dealers, Armando Un and Pedro Ramos, came forward and identified City of Miami police officers Armando Estrada,

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[1] References to the record on appeal before the Eleventh Circuit will be to the letter "R" followed by the volume and page number.

Raman Rodriguez, Armando Garcia, Osvaldo Coello, and Rodolfo Arias as the ones who had rushed the guards. Un and Ramos told how they had helped these officers steal loads of cocaine on this and other occasions (R124 - 2 to 9). The officers were subsequently arrested and tried in federal court. That trial, one of the longest and most publicized in the history of the Southern District of Florida, ended in a mistrial.

Most of the defendants were offered reduced charges and decided to plead guilty. In addition, some of these defendants decided to cooperate with the government and their cooperation led to the indictment of other officers. One of those officers was Petitioner Mario Carballo.

At the second "Miami River Cops" trial the government presented testimony by former officers Rudy Arias, Reginald Capiro, and Carlos Pedrera and by former drug dealer Armando Un. Through the testimony of the former police officer-defendants, the government argued that Carballo had been involved in four incidents: an attempt to steal a load of marijuana that was to be stashed at Tower Paint, the theft of a bale of marijuana found behind a shopping center, the theft of a large quantity of cocaine that was being stored on a boat at the Tamiami marina, and in assisting in the sale of cocaine stolen from a boat docked at the Jones Boat Yard.

Rudolfo Arias was the government's star witness against Carballo. According to Arias, on July 12, 1985, he received

a telephone call from Arturo De La Vega who told him that drug dealer Luis Rodriguez had contacted Armando Estrada and said that a boat had come into the Miami river laden with cocaine. According to Rodriguez, the cocaine, which was hidden in a secret compartment, was to be loaded onto a van. Estrada suggested that they pull the van over and steal the cocaine and Estrada asked Arias to meet him at Grapeland Park around 7 p.m. and to bring his patrol car (R126 - 295).

Around 7 p.m., Arias, Carlos Pedrera, Arturo De La Vega, Victor Zapata, and Armando Estrada gathered at Grapeland Park to plan their attack. After concluding that the information they had was good, they proceeded to the marina where they spotted the van leav-

ing. The officers followed the van and pulled it over but there was nothing inside (R126 - 303 to 304). After returning to the marina, they decided to board the boat and locate the secret compartment. They also decided that they would need more help. They wanted to have marked units outside of the gate in case any officers from the Metro Police Department came by (R 126 - 306).

Arias testified that the officers called in were Omar Manzanilla, Armando Garcia, Carlos Pedrera, and Mario Carballo (R126 - 308, 310). After these reinforcements arrived, Coello, Arias, Betancourt, Garcia, and Estrada went inside the marina accompanied by drug dealers Un and Ramos who knew where the secret compartment was located (R126 - 310 to 311). After the cocaine was found

the officers formed a chain and passed the bags from one to another until they reached the gate. Thereafter the cocaine was passed over the fence to either Manzanilla, Carballo, or Carlos Pedrera who would then load the cocaine into one of the many cars outside (R126 - 313 to 314).

Arias admitted that he did not actually see Carballo load any cocaine into his patrol car since he was on the boat with Ramos and Un (R12-6 - 315). Arias testified that when he left the marina he saw Carballo sitting in the driver seat of his patrol car. Carballo was wearing a baseball cap pulled down so that no one would recognize him. Although Arias was not asked whether these persons were in a position to have seen Carballo he nevertheless volunteered

that neither Un nor Ramos would have recognized Carballo (R126 - 318).

The next day Arias met Garcia, Carballo, and Manzanilla at a Shell gas station. Arias told them that they were each to get 10 kilos for their assistance. Zapata was also to get 10 kilos (R126 - 329). The rest of the officers got 30 kilos each and Un and Ramos were given 125 kilos (R126 - 323, 332). When asked how many kilos Carballo had taken in his car, Carballo said that his car had been full of cocaine and that he had taken the cocaine to a friend's house (R126 - 329 to 330). In a subsequent conversation, Arias told Carballo that he could sell his 10 kilos for $30,000 a piece and make $300,000. Carballo replied that he had already sold the cocaine and had only received $220,000 (R126 - 340).

Although Arias did not see Carballo load cocaine into his cruiser, Carlos Pedrera testified that he had (R130 - 1034 to 37).

About two weeks before the incident at Tamiami, Arias was contacted by Carlos Pedrera who said that Carlos Carmona had information that a load of marijuana had arrived by ship and that it had been stored at Tower Paint. Apparently a van was scheduled to arrive at Tower Paint to remove the marijuana. Arias, Pedrera, Capiro, Carballo, Arturo De La Vega, Betancourt, and Estrada watched the store all night but no van ever appeared. They later heard that the ship had been intercepted in Key Largo (R126 - 345 to 350).

Reginald Capiro testified that a few weeks before the Tower Paint incident,

he and Carballo discovered a bale of marijuana behind a shopping center. Carballo said that he knew someone who could sell it for them and later gave Capiro $4500 as his share of the profits (R135 - 1938). Carballo also helped Capiro sell some of the cocaine that Capiro received from Capiro's participation in the Jones Boat Yard rip-off (R135 - 1956).

Each of the officers who testified that Carballo was involved in criminal activities--Arias, Pedrera, and Capiro--were all charged with crimes and all received reduced sentences as a result of their testimony. Un and Ramos, the drug dealers whose testimony led to the arrest of Arias, Pedrera, and Capiro, were never charged with any offense and said that they did not see Carballo

involved in any of the activity that Arias, Pedrera, and Capiro testified to (R124 - 68). Carlos Carmona, who was given a deal in exchange for his testimony, and who participated in the Tower Pain incident, did not even recognize Carballo (R134 - 1761).

Arias admitted committing perjury hundreds of times in court (R128 - 699 to 700). Arias admitted falsifying police reports, which he called creative writing (R127 - 579). Arias admitted that he would conduct illegal stops (R127 - 579 to 580) and recalled one occasion when he turned in only $3000 of $17000 seized from a drug suspect (R127 - 571 to 572). At his first trial he convinced Luis Batista to lie, paid a drug dealer not to testify against him, and at various times plotted to kill

government witnesses Un, Cossio, and Ramos (R127 - 545; R129 - 792 to 793; R126 - 375, 397, 400-06, 419). He also failed to report the $1.8 million he earned from 1983-85 (R127 - 576).

In exchange for his testimony, Arias was permitted to plead to one 15 year conspiracy count and to forfeit his personal possessions to the IRS (R124 - 57).

The second "River Cops" trial nearly ended the way the first did. On the eighth day of deliberations, the jury informed the court that it was hopelessly deadlocked. The court gave the jury an Allen charge and the jury returned a verdict of guilty as to all counts.

During the government's examination of Arias, the government elicited that Aleman, who was tried separately for his

involvement in the Jones Boatyard Rip-off, had been convicted by a jury. Defense counsel objected to this testimony (R125 - 191) and moved for a mistrial (R130 - 878).

Throughout his examination, Rudy Arias repeatedly accused defense counsel of trying to fool the jury. The first such attack occurred while Arias was being questioned by counsel for Coello. In the course of that cross-examination, Arias testified that during the first "River Cops" trial he and his defense attorney manufactured a defense intended to fool the jury. Arias insisted, however, that he was now telling the truth. Arias added that it was the lawyer questioning him who was now trying to fool

the jury (R127 - 544).[2] A few questions

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[2] Q. Well, do you recall talking to your mistress and telling her that you didn't wanted to be in jail and you would lie and cheat and do whatever it took to get out of jail, do you recall telling her that?
A. It never happened?
Q. It didn't happen?
A. No. Those lies are created by you and you clients.
Q. So it is not true that you would lie and cheat to stay out of jail?
A. No.
Q. But when you came to trial the first trial in which you were a defendant, you lied and you cheated and you had others lie and cheat for you, didn't you?
A. I was coached by my defense attorneys. That's what defense attorneys do.
Q. So it was your defense attorney who told you to lie and cheat.
A. No.
Q. You didn't want to go along with it, Mr. Arias?
A. Let me finish my answer.
We prepared our defense to make a fool of the jury, to confuse the evidence so we can get a not guilty verdict. That's what we did.
Q. Are you trying to fool this

later, Arias attacked the ethics of defense attorneys in general (R127 - 552 to 553)[3]. Counsel for Carballo, Coello, and Manzanilla objected to Arias dispar-

jury with your lies.
A. No.
Q. Or is this honest testimony?
A. No, that is your job now. I am telling the truth.

---

[3] Q. Killing Mr. Un, was that part of the game, your game?
A. Everybody's game to beat the case.
Q. Killing Mr. Ramos would have been part of your game?
A. And Mr. Coello's too.
Q. Killing Luis Rodriguez would have been part of your game?
A. No, we had nothing to do with the murder of Luis Rodriguez.
Q. I keep asking you about yourself and you keep telling me about other people.
A. I tell you about me and other people.
Q. Let me finish my other people. Had you been requested to do this or are you doing this for any specific purpose, sir?
A. No, I just give you the answer of what I know and know what you defense attorneys are made out of.

aging remarks (R127 - 553, 554). The court, thereafter, instructed the jury to disregard these remarks (R127 - 556).

Arias, however, was not deterred. When Arias again commented that defense counsel was playing games, the court refused to permit counsel to approach the bench to lodge an objection (R129 - 776).

Not only did Arias attack the ethics of defense counsel, he also attempted to bolster his own credibility by interjecting the fact that Aleman was convicted and that other officers had pled guilty based upon information he had provided (R128 - 701 to 02).

After deliberations began, the foreman of the jury went to the Dade County Public Library and checked out three books about jury duty. He took one of

these books, What You Need to Know for Jury Duty, by Godfrey Lehman, into the jury room with him. The book is extremely contemptuous of the role of lawyers. In Chapter Three the author states:

> Each attorney will work to confuse you-to distort, to befog, to distract-in order to win your vote. He will go as far as permitted, restrained only by the judge...But a skillful lawyer knows how to bypass the limitations of the court often quite efficiently.

(R11 - 2176 - 14).

This book also suggested ways to avoid the disgrace of a hung jury and suggested that the jury compromise their verdict to avoid such disgrace.

(R11 - 2176 - 20).

REASONS FOR GRANTING THE WRIT

I

AN APPELLATE COURT CANNOT FIND ERRORS TO BE HARMLESS WITHOUT CONSIDERING THE STRENGTH OF THE GOVERNMENT'S CASE AND THE PROBABLE EFFECT OF THE ERRORS ON THE JURY'S DELIBERATIONS

Three errors were found to have occurred during the trial of Mario Carballo. The first was the introduction of testimony that a different jury had convicted a co-defendant as a result of the cooperation of the government's star witness, Rudy Arias. The second was the repeated attacks on defense counsel by Arias and in particular the suggestion that defense counsel through their lies had caused the original jury to deadlock and were trying to do so again. The third was the introduction into the jury's deliberations of a book on jury service, which book elaborated on Arias'

views of attorneys and which book suggested that jurors should compromise their verdicts in order to avoid the disgrace of a hung jury. Each of these errors, however, was found to be harmless.

Contrary to the express directives of numerous decisions of this Court, the Eleventh Circuit engaged in no form of harmless error analysis. Having found that the trial had been infected by error, the Eleventh Circuit simply administered a dose of harmless error to cure the disease. At no time did the court consider the strength of the government's evidence against the accused or the likely effect of the errors on the jury's deliberations.

The treatment of harmless error by the Eleventh Circuit is in direct con-

flict with virtually every harmless error decision rendered by this Court. It is well settled that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967). In making that determination, appellate courts are required to consider the record as a whole. Rose v. Clark, 478 U.S. 570, 576 (1986). Carella v. California, ____ U.S. ____, 109 S.Ct. 2419, 2421 (1989). No one factor is determinative of this question; indeed, a host of factors should be considered "...includ[ing] the importance of the [error] in the prosecution's case, whether, the [erroneously admitted evidence] was cumulative, the presence

or absence of corroborating or contradicting [evidence]..., and, of course, the overall strength of the prosecution's case." Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).

The nature of that inquiry has been illustrated over and over by decisions of this Court. In Olden v. Kentucky, ___ U.S. ____, 109 S.Ct. 480 (1988), this Court held that a trial court's refusal to permit a black defendant in a kidnapping, rape, and sodomy trial to cross-examination a white complainant regarding her cohabitation with a black boyfriend violated the defendant's Sixth Amendment confrontation right. In rejecting the state's argument that the error was harmless, this Court engaged in a detailed analysis of the state's evidence and the role of the complain-

ant's testimony in that case. Id. at 484.

In Satterwhite v. Texas, ___ U.S. ____, 108 S.Ct. 1792 (1988), this Court found that the use of a psychiatrist's testimony at a capital sentencing proceeding on the issue of future dangerousness violated the defendant's Sixth Amendment right to counsel. In rejecting the state's argument that the error was harmless, this Court again engaged in a detailed analysis of the nature of the state's evidence and the role that the psychiatrist's testimony necessarily played in the jury's decision to recommend death. Id. at 1799.

The Eleventh Circuit, however, failed to engage in any such inquiry. And that failure threatens to undermine the vast body of law that this Court has

created to insure the proper review of constitutional error.

It is well settled that a reviewing court may not substitute its review of the evidence for that of the jury's. R. Traynor, The Riddle of Harmless Error, 20-21 (1970). The fact that an appellate panel believes that the jury reached the correct result is simply not sufficient to satisfy the requirements of harmless error. As this Court noted in Rose v. Clark, 478 U.S. 581 n.11, "the determination of guilt or innocence, according to the standard of proof required by Winship and its progeny, is for the jury rather than the court." Thus there is a critical distinction between a finding that the evidence was sufficient to find the defendant guilty and a finding that due

to the overwhelming evidence presented at trial a particular error could not have influenced the jury's verdict. United States v. Lane, 474 U.S. 438, 450 n.13 (1986). As this Court has made clear, "the threshold of overwhelming evidence is far higher than mere sufficiency to uphold conviction." Id. Thus even where sufficiency of evidence is not an issue on appeal, an appellate court must still determine either that the evidence was overwhelming or could not possibly have affected the jury's deliberations before finding constitutional error to be harmless. Saltzberg, The Harm of Harmless Error, 59 Va.L.Rev. 988, 1019-20 (1973); Field, Assessing the Harmlessness of Federal Constitutional Error - A Process In Need of a Rationale, 125 V.Pa.L.Rev. 15, 32

(1976); Stacy and Dayton, Rethinking Harmless Constitutional Error, 88 Colum.L.Rev. 78, 130 (1988); Note, 100 Haw.L.Rev. 116 (1986).

What is required of reviewing courts. First, a consideration of the trial record as a whole. Second, a determination that the evidence of guilt was so overwhelmingly established that the errors complained of could not have affected the jury's verdict. Carella v. California, 109 S.Ct. 2421 (Scalia concurring). But that did not occur here. More importantly, under the kind of harmless error analysis now prevalent in the Eleventh Circuit, no such process is required. As the following demonstrates, properly employed harmless error analysis would likely have led the Eleventh Circuit to a different conclusion.

A. Testimony Concerning Conviction of Codefendant.

The Eleventh Circuit found that the United States committed plain error when it elicited from its star witness, Rudy Arias, the fact that a co-defendant had been convicted by a different jury. In the words of this Court, "it is clear that the government's solicitation of Arias' testimony concerning Aleman's conviction was patently improper." (App. p.17) [4]

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[4] We recognize that this error may not itself violate the constitution, nevertheless testimony concerning the conviction of a co-defendant by another jury so threatens to undermine the imparticularity of a jury as to deny Petitioner his Fifth Amendment right to a fair trial. United States v. Lane, 474 U.S. 438, 446 n.8 (1986).

The court, however, found that this error was cured by the trial court's instructions to the jury.

In so holding, however, the court chose to consider this testimony in isolation.

Had the Court considered Arias' testimony in the context of the entire trial, the Court would have found:

1. The government's case against Carballo consisted almost entirely of testimony by former co-defendants, all of whom were severely impeached. There was almost no evidence to corroborate these witnesses' testimony. Although the evidence presented by the government was sufficient to satisfy the Circuit's test for sufficiency of the evidence, [5] the

[5] Which is why we did not contest the sufficiency of the evidence.

government's case was far from overwhelming. Nowhere in the Eleventh Circuit's opinion did the court consider the strength of the government's case, which is the predominate factor in all harmless error analysis. Milton v. Wainwright, 407 U.S. 371, 377-78 (1972); Matire v. Wainwright, 811 F.2d 1430, 1436-38 (11th Cir. 1987).

2. Arias interjected Aleman's conviction in order to bolster his own credibility. But Arias was not the first witness to mention Aleman's trial. Earlier, in its examination of Detective Diaz, the government point blank asked its witness whether Aleman had been convicted. An objection prevented the question from being answered at that time, but the jury did learn the answer from Arias. Thus the issue of Aleman's

from Arias. Thus the issue of Aleman's conviction was not an isolated event.

3. The prejudice flowing from the jury learning of Aleman's conviction was compounded by their likely speculation as to the reasons for the absence of other co-defendants. When this trial began, six defendants appeared to contest the charges against them: Betancourt, Rojas, De La Vega, Manzanilla, Carballo, and Coello. On the first day of jury selection Betancourt entered a plea. On the second day of jury selection Rojas pled. On the third day of jury selection De La Vega pled. In the course of the trial Manzanilla pled. These officers' pleas were extensively reported in the media. Although the district court did instruct the jury that they were not to infer anything

from the absence of the other defendants, the impact of such an instruction is questionable given the jury's knowledge of Aleman's conviction. Such instructions also lose their effectiveness where the court finds it necessary to issue multiple cautionary instructions.

4. Finally, the court failed to take into consideration the fact that after a week of deliberations the jury informed the court that it was deadlocked, and reached a verdict only after being given an Allen charge.[6]

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[6] At the end of the first week of deliberations the jury sent a note to the court which said:

> We have taken a vote on all indictments and are unable to reach a verdict on any. The jury as a group feels that further review of the testimony and evidence would be fruitless.

(R155 - 56). The jury reached its

B. Disparaging Remarks Concerning Defense Counsel.

The Eleventh Circuit found that co-defendant turned government witness Rodolfo Arias was "a loose cannon who frequently blasted defense counsel with disparaging remarks critical of both the defense bar in general and these attorneys in question." (App. p.19). Such remarks undermine a defendant's Sixth Amendment right to counsel since:

> To discredit defense counsel in front of the jury is improper, and even subsequent jury instructions aimed at rectifying this error may not ensure that these disparaging remarks have not already deprived the defendant of a fair trial.

Zebouni v. United States, 226 F.2d

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verdict only after the district court read it the Allen charge and the foreman brought the extra-record book into the jury room.

826, 827 (5th Cir. 1955); United States v. McLain, 823 F.2d 1457, 1462 (11th Cir. 1987).

As the Eleventh Circuit itself recognized, the district judge was unable to restrain Arias from making unsolicited remarks:

> [S]hort of imposing contempt charges, the court labored to restrain Arias and others from making unsolicited remarks, and frequently admonished the jury to disregard Arias' non-responsive answers.

(App. p19).

Courts have recognized that instructions to disregard may not be sufficient to cure the prejudice flowing from such attacks. McLain supra. That is particularly true under the facts of this case:

1. Arias did not merely attack the ethics of defense counsel. He suggested that the attorneys in this case were

attempting to fool the jury into believing that the defendants were not guilty.

2. Arias's assertions concerning defense counsel carried particular weight since he was a defendant in the first trial, that trial ended in a mistrial, and it was his message to this jury that the previous jury had been made fools of by defense counsel.

3. Arias's assertions were confirmed by the book that the foreman brought into the jury room which book warned jurors not to be fooled by the arguments of counsel.

It may well be that the district judge did all that he could to restrain Arias. And it may well be that the judge cannot be faulted for the error that occurred. But that does not change the

fact that the defendants could not have received a fair trial where the government's chief witness repeatedly suggested that defense counsel were trying to mislead the jury. The court's observation that there are no cases requiring the government to muzzle its witnesses and that there are no cases requiring reversal due to disparaging remarks made by witnesses, proves nothing more than the fact that no appellate court has yet to face the situation presented herein. These are not reasons for finding the error to be harmless.

C. Presence of Extrinsic Material During Jury Deliberations.

After deliberations began, the foreman of the jury went to the Dade County Public Library and checked out three books about jury duty. After the jury

became deadlocked, he took one of these books, What You Need to Know for Jury Duty, by Godfrey Lehman, into the jury room with him. In this book, the author suggests rules of procedure to follow during deliberations. Rule number three was not to begin by taking a ballot. According to Mr. Lehman:

> My advice about your third step is a "Don't. "...Never start by taking a ballot on the verdict!...There are many dangers...A divided vote imposes upon the minority a three point dilemma:...the potential disgrace of forcing a hung jury.

The book further provided the foreman with a way to avoid the disgrace of a hung jury by advising that defense attorneys would "be content" and indeed "will respect [the jurors]" for returning a "guilty" verdict on some charges while returning "not guilty" verdicts on others. "Both sides would probably find

[it] reasonable and satisfactory." (R11 - 2176 - 20). The book further states:

> ...or if it is a criminal case, the defense lawyer would be content with a "guilty" verdict on perhaps two counts instead of all five against his client.
>
> > You do not know what is in his mind, or his goal. But you do not have to...in the criminal case you might find the defendant guilty on three counts and innocent on two others, which both sides would probably find reasonable and satisfactory.
> >
> > In either situation, justice will have been attained. The attorneys will respect you for it.

(R11 - 2176 - 20).

The record establishes conclusively that the foreman read the entire book. Thus at least one juror was exposed to

material which suggested a way of reaching a verdict in total disregard of the evidence presented. And at least one juror was exposed to material which warned of the disgrace of a hung jury. Although the Eleventh Circuit found that no other juror read the entire book, in fact the record is simply silent on that question. Moreover, even if no other juror read the book, there was no way of preventing the other jurors from being influenced by what the foreman read.

The prejudice flowing from the use of this book by the foreman is obvious. The jury in this case was told that the prior jury had been unable to reach a verdict. That prior jury was ridiculed in the press and investigated by the United States Attorneys Office for jury tampering. (SR 293) Plainly they would

have been affected by arguments that a further deadlock would be a disgrace. And certainly they would have been influenced by arguments that the way to avoid this disgrace was to compromise their verdict.

What this book did was deny appellant his right to a unanimous verdict, one based upon the evidence, and one not influenced by rogue jury instructions. This is simply not an error which can be deemed harmless.

II.

CONSTITUTIONAL ERROR CAN NEVER BE DEEMED HARMLESS WHERE THE JURY DEADLOCKED DURING ITS DELIBERATIONS

At the end of the first week of deliberations the jury sent a note to the court which said:

> We have taken a vote on

> all indictments and are unable to reach a verdict on any. The jury as a group feels that further review of the testimony and evidence would be fruitless.

(R155 - 56). The jury reached its verdict only after the district court read it the Allen charge and the foreman brought the extra-record book into the jury room.

In Chapman v. California, 386 U.S. 18 (1987) this Court recognized that some constitutional errors require reversal without regard to the evidence in the particular case. A per se rule of reversal has been applied where there has been a complete denial of the right to counsel, Gideon v. Wainwright, 372 U.S. 335 (1963), where a defendant was tried by a biased judge, Tumey v. Ohio, 273 U.S. 510 (1927), where a coerced confession was used at trial, Payne v.

Arkansas, 356 U.S. 560 (1958), and where jury selection was presided over by a magistrate. Gomez v. United States, ___ U.S. ___, 109 S.Ct. 2237 (1989).

We believe that like certain errors which "necessarily render a trial fundamentally unfair," Rose v. Clark, 478 U.S. 577, there are circumstances which may make appellate review of error fundamentally unfair. This is illustrated by this court's decision in Penson v. Ohio, ___ U.S. ___, 109 S.Ct. 346 (1988) in which this court held that an appellate court's independent review of the record at trial was not sufficient without the assistance of counsel for the defendant. Id. at 353-54.

In the case at bar, the jury became deadlocked after eight days of deliberations. While it ultimately reached a

verdict, it is impossible for any court to know whether that verdict was influenced by arguments that another jury had convicted a co-defendant, other defendants had entered pleas, the defense attorneys were trying to fool the jurors, or that they would be disgraced if they remained deadlocked.

Under these circumstances, the danger that the jurors came to a decision to convict Petitioner based upon matters other than the evidence of guilt is so great that the Eleventh Circuit could not properly have found the errors to be harmless.

CONCLUSION

The purpose of the harmless error rule is to avoid "setting aside convictions for small errors or defects that have little, if any likelihood of having changed the result of the trial." Chapman v. California, 386 U.S. 18, 22 (1967). Because of the decision of the Eleventh Circuit conflicts with the precedents of this court and because the decision represents a dangerous departure from settled law, this case merits review by this court.

Respectfully submitted.

JON MAY
Counsel of Record

January 1991

APENDIX

UNITED STATES, Plaintiff-Appellee,

v.

Arturo DE LA VEGA, Raimundo Betancourt, Ricardo Aleman,
Mario Carballo and Osvaldo Copello,
Defendants-Appellants.

No. 88-5166.

United States Court of Appeals,
Eleventh Circuit.

Oct. 2, 1990

Appeal from the United States District Court for the Southern District of Florida

Before TJOFLAT, Chief Judge, CLARK, Circuit Judge, and ESCHBACH*, Senior Circuit Judge.

ESCHBACH, Senior Circuit Judge:

This is the consolidated appeal of five individuals who, based upon their

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

involvement in what was dubbed the "Miami River Cops Case", were convicted of various offenses under the federal racketeering, narcotics, civil rights and tax laws. On appeal, they raise numerous arguments challenging their convictions or sentences.[1] We affirm the convictions of all appellants but vacate the sentences of appellants Betancourt and De La Vega and remand them for re-sentencing.

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1. Since none of the appellants challenge the sufficiency of the evidence, we limit our recitation of the facts comprising this criminal undertaking to those helpful to the reader's understanding of the reasons for our disposition of those issues raised on appeal.

I.

PROCEDURAL BACKGROUND

The investigation by Metro-Dade Homicide Detectives of the causes of death of three corpses found floating in the Miami River led to the discovery of a scheme by which several Miami police officers forcibly separated narcotics traffickers from their drugs or ill-gotten gains then sold or otherwise distributed the illicit products. This practice netted the officers millions in proceeds and, after a lengthy procedural passage through the criminal justice funnel, hundreds of months in prison.

Their path to prison is as interesting as it is arduous. On June 12, 1986,

appellants Coello, De La Vega and Aleman were first indicted along with four others for violating RICO and narcotics laws. After the return of a superseding indictment on September 4, 1986, a jury was impaneled and on September 26, 1986 their trial commenced. After nearly four months of trial and deliberation the jury was unable to achieve unanimity, and, on January 21, 1987 a mistrial was declared. The saga continued on May 7, 1987 with the return of a second superseding indictment adding additional defendants and charges of income tax evasion. On July 14, 1987 the grand jury returned its third and final superceding indictment including appellants Betancourt and Carballo and adding charges of conspiracy to murder government witnesses. Of the fifteen men

charged in the indictment, only three pled not guilty and sought jury trials.[2] Appellant Aleman was tried separately in September of 1987 and convicted of violating federal narcotics and tax laws. After two-and-a-half months of trial, on February 9, 1988, appellants Carballo and Coello were found guilty by a jury of violating federal racketeering and narcotics laws.[3] The defendants now

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2. Appellants De La Vega and Betancourt pled guilty and on appeal challenge only the trial court's compliance with sentencing procedures mandated by the federal rules of criminal procedure.

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3. Defendant Omar Manzanilla initially pled not guilty and proceeded to trial with appellants Carballo and Coello. Midway through trial, however, Manzanilla changed his plea to guilty.

appeal asserting that the cumulative effect of a plethora of erroneous rulings denied them their right to a fair trial.

II.

CARBALLO AND COELLO'S APPEAL

A. PRETRIAL PUBLICITY

1. *Background*

Not surprisingly the serious charges of widespread police wrongdoing, including murder allegations, piqued the attention and concern of the public. Accordingly, the media documented this two year drama with several hundred news reports. Though largely dispassionate,

these accounts were occasionally punctuated by editorial remarks. In addition, these reports were disseminated by the major audio, video and print media sources which collectively reached the entire Dade County metropolitan area. Consequently, with two exceptions, all potential jurors recalled hearing something about the case. The extent and character of the veniremen's knowledge, however, greatly varied. While during individual questioning of about eighty veniremen concerning the extent of their knowledge of the "Miami River Cops Case" approximately twenty-five potential jurors indicated that they had already formed an opinion about the guilt or innocence of the defendants, the vast majority recalled only sketchy details of facts publicized by the media. As

for those ultimately impaneled as jurors, two had never heard of the case and the most the other jurors knew *collectively* was that the case involved policemen, drugs, a murder on the Miami River, and a previous trial. All impaneled jurors indicated that they had not formed an opinion regarding the guilt or innocence of the defendants and stated that they could be impartial and render a verdict based solely on the evidence admitted at trial.

2. *Discussion*

[1] Carballo and Coello allege that the pretrial publicity surrounding this case was so pervasive and prejudicial that the trial court's refusal to grant their motion for a change of venue or

continuance deprived them of their Sixth Amendment right to trial by a fair and impartial jury. To prevail on this claim the appellants must show that they were actually prejudiced by the selection of this jury or that the factual circumstances of this case require the application of a presumption of prejudice.

a. Actual Prejudice

[2] A finding of actual prejudice requires the appellants to demonstrate that one or more jurors entertained an opinion before the trial that the defendants were guilty and show that these jurors could not put this prejudice aside and render a verdict based solely on the evidence presented. *Irvin v. Dowd*,

366 U.S. 717, 722-723, 727, 81 S.Ct. 1639, 1642-43, 1645, 6 L.Ed.2d 751 (1961); *Cummings v. Dugger*, 862 F.2d 1504 1509-10 (11th Cir.1989). Since mere exposure to pretrial publicity and some juror knowledge of the facts and issues involved in a case is constitutionally permissible, *Irvin v. Dowd*, 366 U.S. at 722-23, 81 S.Ct. at 1642-43, and since the record in this case in no way shows any evidence of jury bias or hostility towards the defendants, we must conclude that the trial court did not commit manifest error in concluding that this jury was not actually prejudiced against the appellants. *See Cummings v. Dugger*, 862 F.2d at 1511.

b. Presumed Prejudice

[3] As no juror was actually prejudiced, relief may be granted only upon satisfaction of the presumed prejudiced standard. Jury prejudice may be presumed from pretrial publicity if the publicity is sufficiently prejudicial and inflammatory and if it saturated the community where the trial was held. *Murphy v. Florida*, 421 U.S. 794, 798-99, 95 S.Ct. 2031, 2035-36, 44 L.Ed.2d 589 (1975); *Rideau v. Louisiana*, 373 U.S. 723, 726-27, 83 S.Ct. 1417, 1644-45, 10 L.Ed.2d 663 (1963); *Cummings v. Dugger*, 862 F.2d at 1511; *Bundy v. Dugger*, 850 F.2d 1402, 1424 (11th Cir.1988); *Coleman v. Kemp*, 778 F.2d 1487, 1490 (11th Cir. 1985). This standard is reserved for extreme situations where pretrial pub-

licity renders "virtually impossible a fair trial by an impartial jury drawn from the community." *Mayola v. Alabama*, 623 F.2d 992, 997 (5th Cir.1980) *See also, Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554, 96 S.Ct. 2791, 2800, 49 L.Ed.2d 683 (1976); *Cummings v. Dugger*, 862 F.2d at 1511; *Coleman v. Kemp*, 778 F.2d at 1490-91.

[4,5] While acknowledging that the media coverage of the Miami River Cops investigation and trials was extensive, the publicity was not sufficiently prejudicial and inflammatory to satisfy the "extensive evidentiary showing [required] to warrant relief." *Coleman v. Kemp*, 778 F.2d at 1491. With few exceptions, the three hundred and thirty newspaper articles included in the re-

cord are largely factual in nature and could not have created the sort of inflamed community atmosphere which courts deem presumptively prejudicial. *See Rideau v. Louisiana*, 373 U.S. at 724-27, 83 S.Ct. at 1418-20, (prejudice presumed where defendant's confession to robbery, kidnapping and murder was videotaped and shown three times by television stations and broadcasts reached audiences of 24,000, 53,000 and 29,000 in a community of 150,000); *Coleman v. Kemp*, 778 F.2d at 1491-1543 (prejudice presumed from extensive pretrial publicity prejudging guilt and sentence of defendants accused of killing a family in a rural county with a population of 7,000). That the community was aware of the defendants' alleged misconduct is simply not enough to satisfy the extremely heavy burden

necessary to invoke the irrebuttable presumption that no impartial and fair jury could be assembled to try these defendants. *Coleman v. Kemp*, 778 F.2d at 1537; *See also, Bundy v. Dugger*, 850 F.2d at 1425, (No presumed prejudice from extensive media coverage where poll suggested 98% of a county residents were familiar with the name "Bundy", 58% knew he had been involved in an earlier case, and 31% believed that Bundy's conviction in that case strongly indicated his guilt in the present case). Accordingly, we conclude that in this case, where the relevant community contained approximately 1.8 million persons and the news reports were largely factual, the court did not err in concluding that the community was not so inflamed and biased so as to create a presumption of prejudice

that a fair and impartial jury panel could not be impaneled.[4]

B. EVIDENCE OF CO-DEFENDANTS' CONVICTION

1. *Background*

Carballo and Coello next claim that the trial court erred in denying their

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4. The pretrial publicity surrounding the guilty pleas entered by co-defendants Betancourt, Rojas, and De La Vega during jury selection, while relevant to our pretrial publicity analysis, does not satisfy the heavy burden associated with presumed prejudice. Additionally, the mere disappearance from counsel table of defendants Betancourt, Rojas, De La Vega and Manzanilla, particularly when coupled with the trial judge's admonition that nothing is to be inferred by their absence, does not show juror awareness of co-defendants' guilt meriting reversal.

motion for a mistrial after the government elicited statements from a witness that a co-defendant had been separately tried and convicted for his involvement in this case. The incident occurred during the re-direct examination of government case agent Detective Alex Alvarez by Special Assistant United States Attorney Trudi Novicki who asked,

> Q. [s]econdly, what was the trial of Aleman? you were asked about Rudy Arias testifying at the trial of Aleman. What was that trial?
>
> (... objection ... overruled.).
>
> A. What were the charges?

Q. Yes, what was it? What was the Aleman trial?

A. He was charged with guarding the cocaine from the Jones Boat Yard incident.

Q. He was one of the River Cops, correct?

A. Yes.

Q. Was he convicted in that trial?

Mr. Diaz: Objection, your Honor.

The Court: Well, the question has been interjected in the case. Are you suggesting-

Mr. Diaz: Reserve a motion.

Ms. Novicki: I will withdraw the question.

The Court: All right.

Mr. Diaz: Judge, I still have a motion. Now I definitely have a motion because obviously we have questions that have been asked in bad faith.

Ms. Novicki: That's not true. You have an objection.

While Detective Diaz did not actually acknowledge Aleman's conviction, three days later during

Manzanilla's cross-examination of co-conspirator turned government witness Rodolfo Airas, Arias gratuitously stated that Aleman had been convicted and another objection was made and motion reserved. Two trial days later, the court denied defense counsel's motion for a mistrial based on the revelation of Aleman's conviction. Thereafter, however, the court promptly reinstructed the jury on the burden of proof, reasonable doubt, presumption of innocence and specifically informed jurors that "the fact that any other person has been convicted is not proof in and of itself of the guilt or any other person in the case."

2. *Discussion*

[6] The admission of guilty pleas or convictions of co-defendants not subject to cross-examination is generally considered plain error. *United States v. McLain*, 823 F.2d 1457, 1465 (11th Cir. 1987); *United States v. Griffin*, 778 F.2d 707, 711 (11th Cir.1985). This is so because "[i]n most occasions, the admission of a co-defendant's guilty plea will substantially affect the defendant's right to a fair trial in that 'the jury may regard the issue of the remaining defendant's guilt as settled and that the trial is a mere formality.'" *United States v. McLain*, 823 F.2d at 1465 (quoting, *United States v. Griffin* 778 F.2d at 711). "A number of our cases ... have declined to find plain error when the fact of a co-con-

spirator's guilty plea [or conviction] was made known to the jury ..." *United States v. King*, 505 F.2d 602, 608 (5th Cir. 1974); *see United States v. Lasteed*, 832 F.2d 1240, 1243-44, (11th Cir.1987) (prompt cautionary instruction cured "inexcusable government antics" designed to reveal co-defendant's conviction); *United States v. Nickerson*, 669 F.2d 1016 (11th Cir.1982) (prompt cautionary instruction cured "blatantly improper" government question and answer informing jury that testimony of co-conspirator turned government witness brought convictions in three prior drug trials); *United States v. King*, 505 F.2d 602, (plain error not found where trial judge improperly revealed co-defendant witness's guilty plea, government's improper question and answer further highlighted co-defendant

witness's plea, and no curative instruction given).

[7] While it is clear that the government's solicitation of Arias's testimony concerning Aleman's conviction was patently improper, after considering the facts an d circumstances of this incident in its proper context, we believe that this colloquy was not so prejudicial to the defendant's interests to require a reversal and grant of a new trial. While acknowledging the seriousness of this infection, since this colloquy was certainly no more egregious than those tolerated in *United States v. Lasteed*, 832 F.2d 1240, and *United States v. Nickerson*, 699 F.2d 1016, we believe the court's curative instruction, given to the jury as soon as defense counsel's

formal objection and motion for mistrial was lodged, sufficiently rendered their exposure to Aleman's conviction harmless beyond a reasonable doubt.

C. MISCONDUCT AT TRIAL

Carballo and Coello next assert that disparaging remarks made by a government witness in response to defense questioning coupled with the trial court's "communicated disdain" for the defense and their counsel denied them their basic right to a fair trial. Since a thorough examination of the record proves the allegations of judicial misconduct to be largely fallacious, these alleged errors require only a short shrift.

[8] As the function of trial attorneys is nearly as important as that of the judge, counsel is entitled to respect. *United States* v. *McLain*, 823 F.2d 1457, 162 (11th Cir.1987); *Zebouni* v. *United States*, 226 F.2d 826, 827 (5th Cir.1955). Therefore, "[t]o discredit defense counsel in front of the jury is improper, and even subsequent jury instructions aimed at rectifying this error may not ensure that these disparaging remarks have not already deprived the defendant a fair trial." *Id.* At the same time, however, "this court is cognizant of the maximum that the trial judge has broad discretion in handling the trial and that the reviewing court should restrain itself from interposing its opinion absent a clear showing of abuse." *United States* v. *McLain*, 823 F.2d 1457 (citing

United States v. *Gomez-Rojas*, 507 F.2d 1213, 1223 (5th Cir.1975)).

[9] In this case co-defendant turned government informant/witness Rodolfo Arias was indeed a loose cannon who frequently blasted defense counsel with disparaging remarks critical of both the defense bar in general and these attorneys in particular. It is important to note however, that these remarks were not solicited by the government, but volleyed during defense cross-examination. In addition, short of imposing contempt charges, the court labored to restrain Arias and others from making unsolicited remarks, and frequently admonished the jury to disregard Arias' non-responsive answers. Accordingly, since there is no evidence

of government involvement in this misconduct, since there exists no governmental duty to muzzle prosecution witnesses on cross-examination, since there are no cases requiring reversal because of disparaging remarks made by witnesses and since the trial judge labored to minimize and cure this witness's disparaging remarks, we conclude that the statements were harmless beyond a reasonable doubt.[5]

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5. We reject out of hand appellants' charge that "the court's tone, as well as its failure to discipline the government's witness, reflected badly on defense counsel," denying them a fair trial. A thorough review of the entire trial record clearly shows that Judge Ryskamp conducted this trial conscientiously, impartially and fairly. First, as previously stated, we believe the judge acted within his discretion in dealing with Arias. Secondly, while the judge did occasionally express impatience with the pace of the trial, no prejudicial comments were made in the presence of the jury,

D. REFUSAL TO EXPEDITE SENTENCING OF DEFENSE WITNESSES

[10] The appellants next assert that the trial court abused its discretion in refusing to expedite the sentencing of co-defendants Estrada, De La Vega, and Rodriguez. Since these defendants previously pled guilty they obviously could not assert broad fifth amendment privileges. While acknowledging this, the defense nonetheless asserts that their testimony would have been chilled by

> and the pace and schedule of this trial was well within that necessary to assure fairness. *See U.S. v. McLain*, 823 F.2d at 1459-63. Finally, the judge instructed the jury to disregard any comments he may have made during the trial in arriving at their decision on the facts of the case. *See United States v. Lance*, 853 F.2d 1177, 1182 (5th Cir.1988).

their pending sentencing hearings because the witnesses feared that their inculpatory testimony would be used by the judge to augment their prison terms.

Since the appellants withdrew their subpoenas, whether Judge Ryskamp's refusal to expedite the sentencing of the subpoenaed co-defendants impermissibly interfered with the appellants' rights to compulsory process was not preserved for review by this court. The law of this circuit is quite clear: a defendant waives his claim that he was denied the right to compulsory process where he does not at least subpoena the witness. *Beach v. Blackburn*, 631 F.2d 1168, 1171 (5th Cir.1980); *United States v. Bower*, 575 F.2d 499, 503 (5th Cir.1978), While the appellants did initially subpoena the

witnesses in question, under these circumstances their withdrawal of the subpoenas was the functional equivalent to the failure to subpoena in the first instance. Indeed, since the withdrawal of the subpoenas denied the court the opportunity to determine if the "testimony would have been relevant and material and ... vital to the defense", *Washington v. Texas*, 388 U.S. 14, 16, 87 S.Ct. 1920, 1922, 18 L.Ed.2d 1019 (1967), any harm flowing from the court's refusal to expedite the witnesses' testimony is wholly speculative. See *Luce v. United States*, 469 U.S. 38, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984).

E. DISMISSAL OF HISPANIC JUROR

The appellants continue their challenge of the trial judge's impartiality by asserting in Coello's brief that the judge "manipulat[ed] the jury's composition" "in excusing the only hispanic juror without sufficient inquiry to ascertain if just cause existed." While a hispanic juror was indeed dismissed, the record reveals that his dismissal was properly made after sufficient inquiry.

1. *Background*

Upon return from the recess following counsels' closing arguments, Judge Ryskamp summoned all attorneys to his private robing room where he informed

them that during the break his courtroom deputy was contacted by juror Estaco who sought to be excused because he was fearful of sitting on the panel. With all attorneys present, the judge had the concerned juror brought in for questioning. The judge's examination revealed that the juror, believing himself to be the sole hispanic juror on the panel, feared that he would be "blamed" by the hispanic community regardless of what verdict was returned.[6] After giving the

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6. The dialogue illustrates the juror's concern.

> The Court: I can't talk to you with out attorneys present, so do you just with [sic] to relay to us what your concerns are?
>
> Juror: I was thinking if they could trade me for the extra?
>
> The Court: And why is that?

attorneys an opportunity to pose additional questions to Estaco and after a

> Juror: I assume because I am the only Spanish in the whole group, and you know, whatever come out of this, my community, I may be blamed for it.
>
> The Court: Has anybody ever said anything to you about it?
>
> Juror: No.
>
> The Court: Are you afraid if it should go one way or the other or either way it goes, you would get blamed? In other words, let's say you found him not guilty, are you worried about that or are you worried about if you found him guilty, are you worried about that?
>
> Juror: I don't want to say either way I was thinking. Whatever way I thinking, I am going to vote the way I think it will be.
>
> The Court: You haven't heard the instructions on the law yet.
>
> Juror: No.
>
> The Court: All right, just go back to the jury room and we will let you know.

thorough discussion with the attorneys, the court excused juror Estaco and replaced him with alternate juror Siegel.

2. *Discussion*

[11] Since juror Estaco was dismissed and replaced *before* the jury commenced deliberations, Federal Rule of Criminal Procedure 24(c) governs Judge Ryskamp's decision. The rule requires alternate jurors to "replace jurors who, prior to the time that the jury retires to consider its verdict, become or are found unable or disqualified to perform their duties." Fed.R.Crim.P. 24(c). "The decision to remove a juror and replace him with an alternate is entrusted to the sound discretion of the trial judge 'whenever facts are present-

ed which convince the trial judge that the juror's ability to perform his duty as a juror is impaired.'" *United States v. Fajardo*, 787 F.2d 1523, 1525 (11th Cir. 1986); (citing *United States v. Smith*, 550 F.2d 277, 285 (5th Cir.1977)). This discretion "is not to be disturbed absent a showing of bias or prejudice to the defendant ... or to any other party." *Id.*, (quoting *United States v. Rodriguez*, 573 F.2d 330, 332 (5th Cir. 1978)). "In these instances 'prejudice' includes discharge of a juror 'without factual support of for a legally irrelevant reason.'" *Id.*, *(quoted in Green v. Zant*, 715 F.2d 551, 555-56 (11th Cir.1983)). Moreover, "[a] separate hearing on a juror's incapacity is not required where the juror's inability to continue is clear. ... 'Where the juror's disabil-

ity is less certain or obvious, however, some hearing or inquiry ... is appropriate to the proper exercise of judicial discretion.'" *Id.*

Here the juror's inability to continue serving impartially was less than clear and the trial judge, in the presence of counsel in the privacy of his robing room, properly questioned the juror about his fears. In addition, counsel for both the government and the defendants were given the opportunity to question the juror and to discuss the matter with the judge before he dismissed the juror.

After reviewing the record, we believe that the judge's order dismissing juror Estaco because the juror's fear of

being "blamed" by the community would impair his ability to deliberate was supported by a factual basis. Additionally, because alternate and regular jurors "were drawn in the same net, and being once drawn, were afforded the precise same treatment," *United States v. Johnson*, 657 F.2d 604, 607 (4th Cir. 1981), and because the record contains no evidence supporting a claim that Judge Ryskamp sought, through this action, to manipulate the composition of the jury, replacement of this juror with alternate juror Siegel did not bias or prejudice the defendants.[7] We find,

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7. Since this court denied appellant Coello's motion to supplement the record on appeal with a newspaper article appearing in th Miami Herald in February, 1988 by columnist Charles Whited, we grant the government's motion to strike the portions

therefore, that this substitution was not an abuse of the trial judge's discretion.

F. JUROR MISCONDUCT

Carballo and Coello further claim that a juror's introduction of extrinsic material into the jury room denied them their sixth amendment right to confront witnesses and to a fair trial.

1. *Background*

After appellants' trial it became known through a published media interview of jury foreman Richard Siegel that he introduced extrinsic material into

of appellant Coello's brief which recite portions of that article.

the jury room during deliberation. Pursuant to an evidentiary hearing at which Siegel extensively testified, the following facts surfaced: After the first day of jury deliberation Siegel checked out from the Dade County Public Library a book entitled, "What You Need to Know for Jury Duty," Siegel read the book in its entirety and was particularly intrigued by a chapter offering suggestions on how to organize the jurors during their deliberative process. Indeed, the next day Siegel followed the book's suggestions and held an election to fill the offices of secretary, manager of the evidence, and ballot taker. About a week later Siegel brought the book into the jury and showed "some jurors" a page in the book which outlined the organizational steps which he

was following.[8] Though the book then remained in a drawer for Siegel's occasional reference, no other juror read the book.

2. *Discussion*

[12] Fundamental to the administration of justice is a fair and impartial trial free from extrinsic influence and based solely upon the evidence offered at trial. *Turner v. Louisiana*, 379 U.S. 466, 472, 85 S.Ct. 546, 549, 13 L.Ed.2d 424

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8. This short outline entitled "Suggested Rules of Procedure in the Jury Room" simply proposed five simplistic steps to reach a verdict. These include; Get Organized, Prepare a List of Topics for Discussion, Discuss Each Item in the List for Topics of Discussion, Debate on the Verdict, and Vote on the Verdict.

(1965). However, "[w]hile due process of law mandates that a fair trial be provided to the appellants, there is no constitutional right to a perfect trial." *United States v. Alvarez*, 755 F.2d 830, 859 (11th Cir.1985) (quoting *United States v. Ragsdale*, 438 F.2d 21 (5th Cir. 1971)). Mindful of this oft-quoted aphorism and cognizant that "it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote," we recognize that "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 946, 71

L.Ed.2d 78 (1982). In light of these principles we apply the test recently articulated by this court in *United States v. Rowe*, 906 F.2d 654 (11th Cir.1990), "which determines whether Sixth Amendment fair trial rights are so violated by a jury's exposure to extraneous material or influence that a new trial is warranted." See *United States v. Rowe*, 906 F.2d at 655-57.

> When jurors consider extrinsic evidence, we require a new trial if the evidence poses *a reasonable possibility of prejudice* to the defendant. Prejudice is not presumed. The defendant has the burden of demonstrating prejudice by a preponderance of credible evidence. 'Such prejudice may be shown by evidence that extrinsic

factual matter tainted the jury's deliberations.' However, since it is the court's duty to ensure that the jury verdict is in no way tainted by improper outside influences, the court must investigate the asserted impropriety upon merely a colorable showing of extrinsic influence. Subject only to Federal Rule of Evidence 606(b), the court may use whatever inquisitorial tools are necessary and appropriate to determine prejudice. If after this inquiry the court determines that the defendant met his burden of showing by a preponderance of the evidence the likelihood of jury prejudice, the burden shifts to the government to prove that the consideration of the extrinsic evidence

was harmless. In recognizing the degree of prejudice required and the government's burden to establish harmless error, the strength of the government's case has a bearing on the issue of prejudicial error. Also relevant is the nature of the information learned by the jurors and the manner in which it was revealed. Finally, the standard by which we review the district court's determination of whether the defendants were prejudiced is a factual one committed to the court's 'large discretion.'

Id. at 656-57 (citations omitted).

Applying a "reasonable possibility of prejudice test" to the facts of a

case surprisingly similar to the instant one, the Eighth Circuit found no prejudicial error. *United States* v. *Bassler*, 651 F.2d 600, 601-03 (8th Cir.1981). In *Basdler* a juror took notes on Roberts Rules of Order, taken from a book written about jury duty she checked out from a library. The notes were used to outline a method of procedure by which the jury could have reasonable discussions of divergent points of view and still keep discussions orderly. Finding that these notes were "procedural" and could only have been used to "aid[] the jury in being conscientious and serious in attempting to deliberate in a fair and impartial manner," the Court concluded that the defendants were not sufficiently prejudiced to merit a new trial. *Id.* at 603.

After examining the extrinsic material introduced in this case in light of the judicial inquiry and the record as a whole, we agree with the Eighth Circuit that such "procedural material" did not pose the "reasonable possibility of prejudice" necessary to warrant a new trial. The evidentiary record reveals that solely the foreman read the book, and he found it useful only in providing a structurally logical framework for jurors to examine the reams of evidence presented over the course of the two month trial. Indeed, apart from the procedural framework provided, a reading of this book reveals that its contents are largely innocuous and patently juvenile. Though, as the appellants point out, the book makes some negative

references to attorneys, it basically reiterates existing stereotypes of the profession. In addition, the comments even-handedly describe all attorneys, and the author acknowledges his unfair and harsh treatment.[9] Finally, it must be stressed that the record shows that only juror Siegel actually read the book. Granted *ex ante* this book would not be handed to jurors retiring to deliberate, but after an *ex post* examination of the book, viewed in light

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9. "Do I sound unfair and unduly harsh on attorneys? I probably do, and admit it. But I am being so for good reason. The lawyer employs every weapon in his power because his client expects it, and has hired him expressly for that purpose. As a litigant yourself, you would demand the same aggressiveness, or be mightily disappointed." Godfrey Lehman, *What you need to know for Jury Duty*, p.14

of the government's case, the largely innocuous quality of the procedural structure shared with all jurors, and the Eighth Circuit's judgment in a factually analogous case, we are satisfied that the trial court did not abuse its discretion in determining that the jury's exposure to this material ws harmless beyond a reasonable doubt.[10]

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10. The appellants further argue that the book, in addition to introducing extrinsic evidence into the jury's deliberation, impermissibly *supplemented* the court's modified Allen charge designed to break the deadlock. *See Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896). Since the modified *Allen* charge was perfectly proper and we have previously determined that the book was merely used as a procedural outline in order to guide the jurors' deliberations, we conclude that the book did not add any powder to the court's *Allen*, a.k.a. "dynamite," charge. *See, United States v. Rey*, 811 F.2d 1453 (11th Cir.1987).

G. CUMULATIVE EFFECT

Having concluded that the trial court rules correctly in all instances and that the introduction of improper statements or materials was harmless beyond a reasonable doubt, we necessarily reject the appellants' claim that the cumulative effect of the errors at trial denied them their right to a fair trial. *See Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). While appellants did not receive a "perfect" trial we are confident that they did receive a fair trial in accord with traditional and fundamental standards of due process. Accordingly, the convictions of appellants Coello and Carballo are AFFIRMED.

III.

ALEMAN'S APPEAL

1. *Background*

Ricardo Aleman was tried separately and convicted of violating federal narcotics and tax laws. Aleman's involvement in the Miami River Cops Case involved guarding 400 kilos of cocaine that his co-defendants had ripped off from a boat docked in the Jones Boat Yard on the Miami River. Aleman was paid $100,000 for his services which he did not report as income on his federal income tax return. On appeal, Aleman makes two arguments. First, Aleman presents a two page laundry list of

twenty five alleged instances of evidentiary and other errors whose cumulative effect, he alleges, deprived him of his right to a fair trial. While this list is basically limited to alleging numerous instances of improper admission of co-conspirator testimony, limitations of cross-examination and improper prosecutorial remarks, Aleman cites only two cases and offers less than three full pages of argument to bolster these allegations. Aleman then asserts that the trial court reversibly erred in failing to instruct the jury on his defense theory.

2. *Discussion*

[13] After carefully reviewing the record portions corresponding to

Aleman's twenty-five item list, we conclude that the court's evidentiary rulings were correct, and the government's comments were infrequent and innocuous.[11] The evidence against Aleman was extremely strong, and, beyond any doubt, Aleman received a fair trial.

Aleman's argument concerning the court's refusal to instruct the jury on his defense theory is specious. Quite simply, Aleman denies ever having guarded cocaine and explains his receipt of

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11. The remarks made by the prosecutor, including allegations that defendant was "tripping over his own lies" and that defense tactics were "smoke screens", while improper, were not so pronounced and persistent as to permeate the entire atmosphere of the trial. *United States* v. *McLain*, 823 F.2d at 1462.

the $100,000, which the evidence overwhelming proved to be either possessed or expended by him, as merely a nontaxable gift made to him by his corrupt police friends.

[14] The refusal to give a requested instruction warrants reversal only if (1) the proffered instruction was substantially correct, (2) the requested instruction was not addressed in the charge actually given, and (3) the failure to give the requested instruction seriously impaired the defendant's ability to present and effective defense. *United States v. Walker*, 720 F.2d 1527, 1541 (11th Cir.1983); *United States v. Grissom*, 645 F.2d 461, 464 (5th Cir.1981).

[15] Aleman asserts the court denied

him a fair trial by refusing to instruct the jury that "it was not a crime to accept a gift." An examination of the record reveals, however, that the district court did not arbitrarily refuse to give Aleman's charge but instead insisted that it be reworded. After several dialogues with the court over the wording of the instruction, the court asked the defendant to prepare his final theory of defense instruction which the defendant agreed to do during the lunch hour. However, none was forthcoming.

In any case, Aleman had the opportunity to present his defense theory in closing argument, the appellant testified the money was a gift, the government expert testified that gifts are not

taxable as income, and the court substantially addressed in the jury charge Aleman's defense theory by stating that for taxation purposes income does not include gifts or loans. Accordingly, since we believe that Aleman's theory was substantially covered by the jury instructions given and find that any omission was not so important as to seriously impair the appellant's ability to present a defense, we conclude that the court's refusal to give the defendant's requested instruction was not reversible error. *United States v. Sans*, 731 F.2d 1521, 1529 (11th Cir.1984). The conviction of appellant Aleman is accordingly AFFIRMED.

IV.

DE LA VEGA AND BETANCOURT'S APPEAL

De La Vega Betancourt challenge the validity of their sentences because of alleged inaccuracies in their pre-sentence investigation (PSI) reports which the trial court failed to address as required by Fed.R.Crim.P. 32(c)(3)(D). In relevant part, the rule provides that

> [i]f the comments of the defendant and his counsel or testimony or other information introduced by them allege any factual inaccuracies in the pre-sentence investigation report ... the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. ...

Fed.R.Crim.P. 32(c)(3)(D).

[16, 17] Particularly where, as in this case, the defendants have pled guilty, the rule must be strictly complied with: beyond protecting the defendant from being sentenced on inaccurate information, the PSI is deemed by prison and parole officials as and accurate record of the facts of the criminal's history upon which the court relied at sentencing. *United States v. Manotas-Mejis*, 824 F.2d 360, 368 (5th Cir.1987).

The record reveals that despite De La Vega's and Betancourt's written and oral objections to numerous substantial charges contained in their lengthy presentence reports, the court failed to comply with Rule 32(c)(3)(D) by making

findings as to each controverted point, or, alternatively, indicate *for the record* that no finding was necessary because the disputed matter would not be taken into account.[12]

Accordingly, the sentences of De La Vega and Betancourt are vacated and remanded to the district court for re-sentencing in accordance with Rule 32(c)(3)(D).[13]

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12. The court's offer to amend the PSI with a list of the defendant's objections is too ambiguous to constitute a finding under Rule 32. *United States v. O'Neill*, 767 F.2d 780, 787 n.5 (11th Cir.1985).

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13. On remand, De La Vega and Betancourt may be sentenced by the original sentencing judge.

V

CONCLUSION

For the reasons stated herein, the convictions of appellants Coello, Carballo, and Aleman are AFFIRMED. The sentences of De La Vega and Betancourt are VACATED and their cases are REMANDED for resentencing.

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-5166

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARTURO DE LA VEGA, RAIMUNDO BETTANCOURT, RICARDO ALEMAN, MARIO CARBALLO and OSVALDO COELLO,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion October 2, 1990, 11th Cir., 1990 ___F.2d___).

Before: TJOFLAT, Chief Judge, CLARK, Circuit Judge and ESCHBACH*, Senior Circuit Judge

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

_____
UNITED STATES CIRCUIT JUDGE

*Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

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(9/90)